NO. COA07-1316

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 30577
06 CRS 30579

RICKY DEMARCO ROBINSON,
Defendant.

Appeal by defendant from judgments entered 28 June 2007 by Judge Michael E. Beale in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Kimberly P. Hoppin for defendant-appellant.

GEER, Judge.

Defendant Ricky Demarco Robinson appeals from his convictions of sale of cocaine and conspiracy to sell cocaine. Contrary to defendant's argument, we hold that the State presented sufficient evidence to support each charge. We remand, however, for correction of a clerical error on the judgments.

Facts

At trial, the State's evidence tended to show the following facts. On 20 March 2006, Officer Sidney Lackey of the Charlotte-Mecklenburg Police Department was working undercover in the Grier Heights community in Charlotte, North Carolina. Lackey

had been with the Charlotte-Mecklenburg Police Department since 1990 and had worked as an undercover officer purchasing narcotics hundreds of times. Lackey was working with Officer Brian Scharf, the community coordinator for the Grier Heights area, to set up a "buy campaign" in Grier Heights in which Lackey would pose as an average person and buy narcotics from multiple individuals so that they could be arrested at a later date. Lackey had marked currency to use in purchasing the narcotics.

On 20 March 2006, Lackey was approached by Anthony Stewart at about 3:00 p.m. Stewart asked Lackey what he was looking for, and Lackey responded by saying, "a 10" — referring to a $10.00 rock of crack cocaine. Stewart climbed into Lackey's unmarked car and directed Lackey to drive to Ron's Grocery Store located at 3241 Sam Drenan. When they arrived at 3241 Sam Drenan, Lackey gave Stewart a marked $20.00 bill and instructed Stewart to bring back the change.

Stewart got out of the vehicle and went up to defendant who was sitting in a Ford Explorer approximately 20 to 25 yards away from where Lackey was sitting in his car. Stewart and defendant had a conversation that lasted 30 seconds to a minute and then moved to the corner of the vehicle out of Lackey's view. After a few seconds, without speaking to or interacting with anyone else, Stewart returned to Lackey's vehicle and gave Lackey a $10.00 rock of crack cocaine and $7.00 in change. Stewart explained that he was unable to get correct change. He got back into the car with

Lackey, and Lackey dropped him off at the location where they first met.

Lackey then called Scharf, who was located about one block away, and told him what happened. Lackey described defendant as wearing a red sweatshirt and a black hat and indicated that defendant was in a white Ford Explorer with a chrome grill. Scharf drove to Ron's Grocery Store and approached defendant, who was the only individual in that area who fit the description given by Lackey. Scharf could smell the odor of marijuana coming from the Explorer, but could not remember if he asked defendant about the odor. Scharf asked defendant to step out of the vehicle, and defendant consented to a search of his person. In the pocket of defendant's pants, Scharf found a $20.00 bill with the same serial number as the marked $20.00 bill that Lackey had given Stewart. Scharf found no other drugs or money on defendant's person.

Later that day, Scharf showed Lackey pictures of defendant and Stewart, and Lackey identified them as the individuals involved in the transaction that took place outside Ron's Grocery Store. The substance purchased by Lackey was subsequently determined to be cocaine.

On 22 May 2006, defendant was indicted for conspiracy to sell cocaine and the sale of cocaine. At trial, Stewart, who was serving a 15- to 18-month sentence for this incident, testified on defendant's behalf. According to Stewart, his only purpose in approaching defendant on 20 March 2006 was to ask for change. Stewart claimed that he already had the drugs on his person at that

time. Stewart further testified that defendant never gave Stewart cocaine nor did he encourage Stewart to sell drugs.

On 28 June 2007, the jury found defendant guilty of conspiracy to sell cocaine and the sale of cocaine. Defendant was sentenced to two consecutive presumptive-range sentences of 18 to 22 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends the trial court erred in denying his motion to dismiss. When considering a motion to dismiss, the trial court must determine whether the State presented substantial evidence of each element of the crime and of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

Generally, in order to be convicted of the sale of cocaine, the State must present sufficient evidence that the defendant knowingly sold cocaine to another person. N.C. Gen. Stat. § 90-95(a)(1) (2007). In this case, however, defendant was convicted

of the sale of cocaine under the theory of acting in concert. Under the doctrine of acting in concert, "'[i]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.'" *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403, 123 S. Ct. 495 (2002). Defendant does not dispute that sufficient evidence existed that he was actually or constructively present, but rather argues that the State failed to present sufficient evidence that the two men joined in a common purpose to sell cocaine.

In support of his argument, defendant points to Stewart's testimony during the presentation of defendant's case that the sole purpose of Stewart's interaction with defendant was to ask defendant for change for the $20.00 bill given to him by Lackey. On a motion to dismiss, however, "the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150, 121 S. Ct. 213 (2000). Therefore, Stewart's testimony cannot be considered in connection with the motion to dismiss.

We hold that the State's evidence, when viewed in its most favorable light, was sufficient to allow the jury to find that

defendant and Stewart joined in a common purpose to sell cocaine to Lackey. When Lackey told Stewart he wanted a $10.00 rock of crack cocaine, Stewart told him to drive to a particular address with a grocery store. Once at the address, Lackey gave Stewart a $20.00 bill for the cocaine. Stewart then walked directly to defendant, talked briefly, went with defendant around the side of the Explorer, and returned to Lackey with the requested cocaine. Subsequently, defendant was found to have Lackey's $20.00 bill on his person.

Although defendant argues that this evidence is equally consistent with Stewart's having asked defendant only for change rather than cocaine, we believe, drawing all reasonable inferences in favor of the State, that a jury could reasonably find otherwise. Stewart directed Lackey to drive to the grocery store before he knew that Lackey was going to give him a $20.00 bill and would need change. The evidence suggests no reason why Stewart would direct Lackey to drive to the other location if Stewart already had the cocaine in his possession. Further, after Stewart spoke to defendant, defendant did not reach into his pocket for money or a wallet, but rather went towards the back of his vehicle. Only after meeting with defendant — and solely with defendant — did Stewart show Lackey the cocaine. Finally, Stewart did not have the right change when he returned to Lackey and made no attempt to get the right change by going into the grocery store. We hold that this evidence was sufficient to support the State's theory that

Stewart and defendant were acting in concert in the sale of the cocaine.

Defendant makes essentially the same argument as to the conspiracy charge. In order to be convicted of a criminal conspiracy, there must be evidence of "an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). An express agreement between the parties is not required. *Id.* The State may present "evidence tending to show a mutual, implied understanding." *Id.*

A reasonable juror could have inferred that Stewart directed Lackey to the grocery store because he knew defendant would be there with the drugs that Stewart could then supply to Lackey. The State, therefore, presented sufficient evidence tending to show a mutual understanding between defendant and Stewart. *See State v. Sams*, 148 N.C. App. 141, 144, 557 S.E.2d 638, 641 (2001) (finding sufficient evidence to withstand defendant's motion to dismiss conspiracy to sell cocaine charge where evidence showed that defendant "flagged down" officer and directed him to a room at the motel where defendant said "someone . . . always [had] some [cocaine,]" defendant offered to purchase the cocaine for the officer, and when the two went to the hotel room, the people inside talked only to the officer, indicating that they knew defendant and that she had brought them customers in the past), *appeal dismissed and disc. review denied*, 355 N.C. 352, 562 S.E.2d 429 (2002); *State v. Anderson*, 76 N.C. App. 434, 439, 333 S.E.2d 762, 765 (1985)

(stating "[i]t [is] not necessary that [the agent] observe an actual exchange of money or drugs, or overhear a conversation concerning such, between defendant and [his or her conspirator]"). Therefore, we hold that the trial court did not err in denying either of defendant's motions to dismiss.

II

Defendant next contends that his sentences for both the sale of cocaine and conspiracy to sell cocaine violate the Double Jeopardy Clause of the United States and North Carolina Constitutions. Defendant argues that, under the test set out in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), forming an agreement as required for conspiracy is the same as acting for a common purpose as required under the theory of acting in concert, and, therefore, he has been sentenced twice for the same offense.

Defendant requests plain error review because his trial counsel failed to object to defendant's being sentenced for both offenses. Plain error review, however, is only permitted for review of jury instructions and evidentiary matters. *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641, 121 S. Ct. 1660 (2001). Further, "alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080, 116 S.

Ct. 2563 (1996). Defendant has failed to properly preserve his double jeopardy argument for appeal.

Defendant asks us to apply Rule 2 of the North Carolina Rules of Appellate Procedure to suspend N.C.R. App. P. 10(b)'s requirement that he properly preserve this issue by raising it first in the trial court. In *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008), our Supreme Court recognized that even though the failure to properly preserve an issue for appeal generally precludes appellate review of that issue, in certain instances, "[t]he imperative to correct fundamental error . . . may necessitate appellate review of the merits despite the occurrence of default." The Court explained that "Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest.'" *Id.* (quoting N.C.R. App. P. 2). The *Dogwood* Court stressed, however, that Rule 2 "must be invoked 'cautiously'" and only in "'exceptional circumstances.'" *Id.*

This case does not involve the need to correct fundamental error. "The constitutional prohibition against double jeopardy protects a defendant from 'additional punishment and successive prosecution' for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (quoting *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568, 113 S. Ct. 2849, 2856 (1993)). Under the North Carolina Constitution, the "law of the land" clause includes similar protections. *Id.*, 657

S.E.2d at 659 (citing N.C. Const. art. I, § 19). "'The [Double Jeopardy] [C]lause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.'" *Id.* (quoting *State v. Thompson*, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998)).

With respect to the third category, in which defendant's argument falls, our Supreme Court has held,

> "[E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same."

State v. Tirado, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (quoting *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285, 125 S. Ct. 1600 (2005).

It is well established that the Double Jeopardy Clause is not violated by sentencing a defendant both for conspiracy and for the substantive crime that was the subject of the conspiracy. Our Supreme Court has explained that "'the crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result.'" *State v. Morston*, 336 N.C. 381, 391, 445 S.E.2d 1, 6 (1994) (quoting *State v. Lowery*, 318 N.C. 54, 74, 347 S.E.2d 729, 742 (1986)). Consequently, a defendant may properly be

convicted of and punished for both conspiracy and the substantive offense that was the subject of the conspiracy. *Id.*

Despite this principle, defendant argues that, in this case, because he was convicted of the substantive offense under a theory of acting in concert, the two crimes merge, and double jeopardy prevents his being sentenced consecutively for the two separate offenses. The Supreme Court, however, rejected this argument in *State v. Kemmerlin*, 356 N.C. 446, 476-77, 573 S.E.2d 870, 891 (2002). In *Kemmerlin*, the defendant contended that her convictions for conspiracy to commit murder and first degree murder by acting in concert merged and thus double jeopardy prevented the trial court from sentencing her separately for the two offenses. The Supreme Court disagreed, explaining that while the State was required to prove an agreement with another person to commit murder for the crime of conspiracy to commit murder, the State was not required to prove an agreement for the crime of murder by acting in concert. *Id.* at 477, 573 S.E.2d at 891.

As in *Kemmerlin*, the two offenses of which defendant was convicted in this case each require different acts on the part of defendant. The essence of the crime of conspiracy is the agreement formed between two or more individuals. *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. The crime of conspiracy is complete once the agreement is made; no overt act is required. *State v. Looney*, 294 N.C. 1, 11, 240 S.E.2d 612, 618 (1978). On the other hand, the sale of cocaine by acting in concert requires actual or constructive presence during the actual sale. *Mann*, 355 N.C. at

306, 560 S.E.2d at 784. Thus, because the crimes of conspiracy to sell cocaine and the sale of cocaine by acting in concert require different acts on the part of defendant, the crimes did not merge, and the trial court did not violate the Double Jeopardy Clause by sentencing defendant consecutively for each offense.

III

Next, defendant contends the trial court erred in sentencing him as a prior record level IV when he should have been sentenced as a prior record level III. During sentencing, the State presented the court with a Prior Record Level Worksheet listing and classifying defendant's prior convictions. Subsequently, defendant stipulated to the existence of the convictions listed on the worksheet in the following exchange:

> THE COURT: All right. Has this been examined by you and your client?
>
> [DEFENSE COUNSEL]: Your Honor, we've reviewed it, and basically he told me that they — those convictions are his.
>
> THE COURT: Okay. He would stipulate that those are correct. Okay.
>
> Let me get your signature on that, that he's stipulated to that for the record.
>
> [DEFENSE COUNSEL]: Okay.

Defense counsel then signed the stipulation on the worksheet, stating that defendant "stipulate[s] to the accuracy of the information set out in Sections I. and IV. of this form, including the classification and points assigned to any out-of-state convictions, and agree with the defendant's prior record level or prior conviction level as set out in Section II."

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2007). Among the methods authorized for proving a prior conviction is a "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f)(1). This Court has held that a stipulation, such as the one in this case, is sufficient to meet the State's burden of proving the defendant's prior record level. *See, e.g., State v. Spencer*, 187 N.C. App. 605, 613, 654 S.E.2d 69, 74 (2007) ("Sufficient evidence in the record tends to show defendant stipulated to his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1). The trial court did not err by determining defendant to be a prior record level IV offender."); *State v. Crawford*, 179 N.C. App. 613, 620, 634 S.E.2d 909, 914 (2006) ("Defendant's affirmative statement as to his prior record level constitutes a stipulation for purposes of N.C. Gen. Stat. § 15A-1340.14(f)."), *disc. review denied*, 361 N.C. 360, 644 S.E.2d 363 (2007).

Defendant, however, points to the conviction on the worksheet indicating that defendant was convicted of "POSS MTBY/U-WN 19/20" in Union County on 27 March 1997. The worksheet classified this conviction as a Class 1 misdemeanor. Both the State and defendant agree that this conviction refers to N.C. Gen. Stat. § 18B-302(b)(1) (2007), which makes it unlawful for "[a] person less than 21 years old to purchase, to attempt to purchase, or to

possess malt beverages or unfortified wine . . . ." If the person was 19 or 20 years old at the time of the offense, then the offense is a Class 3 misdemeanor. N.C. Gen. Stat. § 18B-302(i). On the other hand, if the person was under age 19, then the offense is a Class 1 misdemeanor. N.C. Gen. Stat. § 18B-102(b) (2007).

Thus, the proper classification of the conviction depends, in this case, upon a question of fact: defendant's age at the time of the offense. Because an issue of fact was involved, defendant could and did stipulate to the classification of the conviction as a Class 1 misdemeanor. We note that throughout the record on appeal, defendant's birth date is identified as 21 July 1981, which would make defendant 15 on the date of the offense. Defendant, in a footnote, represents that the Department of Corrections "Offender Search" website lists his birth date as 21 July 1980. Although the latter information is outside the record and not properly argued to the Court, we observe, in any event, that this claimed birth date would make defendant 16 on the date of the offense, and the conviction would still properly be classified as a Class 1 misdemeanor.

IV

Finally, defendant contends the trial court erred by failing to consider aggravating and mitigating factors in sentencing him. Defendant acknowledges that "[h]ad the trial court in the present case indicated that it made no written findings because the sentence was in the presumptive range, there would be no issue to argue." Instead, however, the trial court checked the box on the

judgment stating that the trial court "makes no written findings because the prison term imposed is: . . . (d) for drug trafficking offenses." Defendant correctly notes that he was not convicted of drug trafficking offenses and argues that the trial court, therefore, did not specify a proper reason for its failure to consider aggravating and mitigating factors.

Based upon our review of the record, however, it is apparent that the trial court committed a clerical error by checking the wrong box. At the hearing, the trial judge specifically stated that "[t]hese are both sentences in the presumptive range." This statement indicates that the trial court was not making any written findings regarding aggravating and mitigating factors because it was imposing a presumptive-range sentence. The court simply failed to check the correct box.

Clerical errors have been defined as "'[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)). Clerical errors include mistakes such as inadvertently checking the wrong box on pre-printed forms. *See In re D.D.J., D.M.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, ___ N.C. App. ___, ___,

656 S.E.2d 695, 696 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Because it appears that the error made by the court was a clerical error, this case is remanded for correction of that error.

No error in part and remanded in part.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).